IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 28TH NOVEMBER 2007 / 7TH AGRAHAYANA 1929

FAO.No. 182 of 2006()

AGAINST THE ORDER DATED 18/11/2005 IN IA.1337/2005 IN OS.12/2000 of III ADDL.SUB COURT, KOZHIKODE
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APPELLANTS/PETITIONERS/PLAINTIFFS.
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1. M.K.SHAJI,
   MOOLAM VELLY SADHANAM HOUSE,
   CHEVAYOOR AMSOM DESOM, KOZHIKODE.

2. M.K.BAIJU,
   MOOLAM VELLY SADHANAM HOUSE,
   CHEVAYOOR AMSOM DESOM, KOZHIKODE.

3. M.K.HARISH,
   MOOLAM VELLY SADHANAM HOUSE,
   CHEVAYOOR AMSOM DESOM, KOZHIKODE.

4. M.K.NIKHIL,
   MOOLAM VELLY SADHANAM HOUSE,
   CHEVAYOOR AMSOM DESOM, KOZHIKODE.

5. M.K.SHANOJ,
   MOOLAM VELLY SADHANAM HOUSE,
   CHEVAYOOR AMSOM DESOM, KOZHIKODE.

6. M.K.LIBISH,
   MOOLAM VELLY SADHANAM HOUSE,
   CHEVAYOOR AMSOM DESOM, KOZHIKODE.

BY ADV. SRI.A.SUDHI VASUDEVAN

RESPONDENTS: RESPONDENTS/DEFENDANTS.
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1. ABILASH M.K.,
   MOOLAMVELLY SADHANAM, MALAPPARAMBA P.O.,
   KOZHIKODE.

2. KANDHIMATHI M.K.,
   NALINA, NEW BAZAR, VENGERI,
   KOZHIKODE.

3. KALLYANI M.K. (DIED),
   POOTHAMKUZHI HOUSE, MANANTHALATHAZHAM,
   PALAZHI ROAD, KOZHIKODE.

4. SUJATHA M.K.,
   MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

5. RASMI M.K.,
   MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

6. LEELA M.K.,
   MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

7. SONILA,
   MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

8. BABILA M.K.,
   MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

9. PUSHPA M.K.,
   MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

10. SINJU,
    MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

11. ANJU M.K.,
    MOOLAM VALLI SADANAM, MALAPPARAMBA, KOZHIKODE.

12. THE MANAGER,
    VISYA BANK, CHEROOTY ROAD,
    KOZHIKODE.

BY ADV. SRI.TOM K.THOMAS
SRI.O.RAMACHANDRAN NAMBIAR
SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.T.SREEKANTAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 28/11/2007 ALONG WITH FAO NO.223 OF 2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

F.A.O.NOS.182 & 223 OF 2006

Dated this the 28th day of November, 2007

JUDGMENT

Raman, J.

Against the common order passed in I.A.No.1337/05 in O.S.No.12/2000 and I.A.No.1338/2005 in O.S.No.254/2003, the appellants have filed two separate appeals, F.A.O.No.182/06 and F.A.O.No.223/06. O.S.Nos.12/2000 & 254/2003 are the suits for partition. Parties are same. Plaintiffs in O.S.No. 12/2000 are the appellants and plaintiff in O.S.No.254/03 are the respondents. Both the suits were posted on the same date. But the lst plaintiff in O.S.No.12/2000 was absent and hence the suit was dismissed for default. Since the defendants in O.S.No.254/2000 including the appellant herein were absent, that suit was decreed passing a preliminary decree allotting shares to the parties including the appellant. However, since O.S.No.254/03 was decreed virtually accepting the claim of the plaintiffs therein and the appellants had no opportunity to adduce evidence. The contentions raised in the plaint in O.S.No.12/2000 and in the written statement filed by them in

O.S.No.254/03 are identical. But the suit O.S.No.12/2000 was dismissed for default earlier. The defendants in the said suit also want partition but not in a manner as contended by the plaintiffs. Hence, they instituted a separate suit O.S.No.254/03. So however, the dismissal of the suit was later set aside and restored to file. It appears that there was some proceedings before this Court on the question of court fee payable by the plaintiffs in O.S.No.12/2000. In C.R.P.No.2280/01 there was a stay granted and it was without noticing the same that the suit happened to be rejected for non-payment of the court fee. On noticing the above mistake the suit was restored to file.

2. Subsequent to the dismissal of the suit, O.S.No.12/2000 and on which day the suit O.S.No.254/2003 was decreed, the appellants preferred I.A.No.1337/05 in O.S.No.12/2000 seeking to restore the suit to file and I.A.No.1338/2005 in O.S.No.254/03 seeking to set aside the ex parte decree, explaining the circumstances under which the lst plaintiff happened to be absent on the day on which the case was posted earlier. It is the specific case of the lst plaintiff that he was suffering from jaundice and he has already produced a medical certificate. The court below did not enter any finding on the grounds urged. But according to the court below, since there are other plaintiffs in O.S.No.12/00, the mere fact that

the lst plaintiff happened to suffer from any ailment is not a reason for condoning the absence of the other plaintiffs and as a matter of fact, when there is a suit for partition, nothing prevented them from adducing any evidence after appearing in court. Being a partition suit, all of them are equally interested. According to the lst plaintiff, he was contesting the suit on behalf of other plaintiffs. But when the lst plaintiff was absent, nothing prevented him from asking the other plaintiffs in the suit to be present in court and to seek adjournment by giving necessary instructions to the counsel. In this case the lst plaintiff did not appear before the court below nor did the other plaintiffs who are his brothers, appear before the court or giving any instruction. In such circumstances, it cannot be said that the court below was wrong in not restoring the suit to file. O.S.No.254/03, which was already pending, was instituted by the respondents herein. They have raised in their written statement all the plaint contentions in O.S.No.12/2000. If so, no prejudice will be caused provided O.S.No.254/03 is decided on merits. True, the lst appellant herein, who happened to be the 2nd defendant, did not appear. But the lst appellant herein is equally entitled for an opportunity to contest the matter, when he has produced the medical certificate proving that he was suffering from an ailment, he is entitled to say that dismissal of the suit

without giving him an opportunity to contest the matter will really prejudice to his right. In the circumstances, we find that there is no justifiable reason for not giving an opportunity to the appellants to contest the suit O.S.No.254/03 on merits and allowing the application for restoration, I.A.No. 1338/05.

In the result, we allow FAO.No.223/06 and set aside the judgment and decree passed in O.S.No.254/03 and restore the suit to file. The order passed in I.A.No.1337/2005 in O.S.No.12/2000 for the reason already stated cannot be found fault with. Accordingly, F.A.O.No.182/2006 is dismissed.

However, we make it clear that the dismissal of the suit O.S.No.12/2000 shall in no way affect the right of the appellants herein as defendants in O.S.No.254/03. The court below shall dispose of the suit, O.S.No.254/03 on merits without being influenced by such circumstances, as expeditiously as possible, at any rate within four months.

P.R.RAMAN,
Judge.

V.K.MOHANAN,
Judge.

kcv.